Richland Moulded Brick Company *and* Michael Stickney. Case 8–CA–26283

September 20, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On June 7, 1995, Administrative Law Judge Robert M. Schwarzbart issued the attached decision. The Charging Party filed exceptions and a supporting brief. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Rufus L. Warr, Esq., for the General Counsel.
Steven LePage and *R. Scott Summers, Esqs. (R. T. Blankenship & Associates)*, of Greenwood, Indiana, for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT M. SCHWARZBART, Administrative Law Judge. This case was heard in Mansfield, Ohio, on a complaint issued pursuant to charges filed by Michael W. Stickney, an individual.[1] The complaint alleges that Richland Moulded Brick Company (the Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act, by laying Stickney off and by not recalling him because he had engaged in union activities while working for a previous employer, New Artesian Industries (Artesian) and Section 8(a)(1) and (4) of the Act for also having done so because he had filed a charge against Artesian with the National Labor Relations Board (the Board), alleging discriminatory discharge. The complaint further alleges that the Respondent independently violated Section 8(a)(1) of the Act when its plant superintendent declared in the presence of employee Randal Jarvis, directly to Jarvis and/or indirectly in an overheard statement to another supervisor, that Stickney would not be recalled because he had a pending case against Artesian before the Board and that the Respondent did not need that kind of trouble. The Respondent contends that Stickney was but one of 11 employees who were laid off at the time solely for business reasons, that the large majority of those employees thereafter were recalled but that Stickney was not because of his poor job performance and attitude. The Respondent, in its timely filed answer, denied the commission of unfair labor practices.[2]

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Briefs, filed by the General Counsel and the Respondent, have been carefully considered. On the entire record, including my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Ohio corporation with an office and place of business in Mansfield, Ohio, has been engaged in the manufacture and nonretail sale of bricks. From its Ohio facility it annually sells and ships product valued in excess of $50,000 directly to points outside the State of Ohio. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Respondent, engaged at its Mansfield, Ohio plant in the manufacture and nonretail sale of wood-molded bricks, some of which were glazed, produced about 12 million bricks per year. At the time of the hearing, the Respondent employed approximately 50 workers, a number that fluctuated dramatically because of the seasonal nature of the industry and because of the Respondent's dependence on major orders. The Respondent's facility was not unionized.

Dudley Frame was the Respondent's president and principal owner; Scott Frame the vice president with overall plant management responsibilities; Mike Rock the plant superintendent and Paul Brown and Randall Brown, brothers, were yard supervisor and production foreman, respectively. Paul Brown supervised packaging, while Randall Brown oversaw the brick-glazing process, including tonging and hacking, terms which will be defined below. The Charging Party, Michael W. Stickney, variously worked for both Paul and Randall Brown while with the Respondent.

Stickney, on layoff from a different employer at the time of the hearing, was employed by the Respondent as a laborer at various work stations from May 7 until his December 3 layoff. Before commencing his employment with the Respondent, Stickney, on November 20, 1992, had filed unfair labor practice charges against a prior employer, Artesian, in Case 8–CA–25028. That matter was consolidated with four more cases also filed against that employer by Local 719, International Union of Electronics, Electrical, Furniture, Technical, Salaried and Machine Workers, AFL–CIO, on

[1] The relevant docket entries are as follows: The charge was filed on April 6, 1994, the complaint issued on May 19, 1994, and the hearing was held on October 18 and 19.

[2] All dates hereinafter are within 1993 unless otherwise indicated.

whose behalf Stickney assertedly had been active while with Artesian. At the time of the trial of this matter, the hearing in the consolidated cases involving Artesian still was pending.

Until the second shift was discontinued after July, the Respondent had operated with 2 shifts, with 40 to 45 employees on the first shift and 9 to 10 on the second. After July, the plant went to 1 shift, generally with 50 to 60 employees. As noted however, these numbers were subject to fluctuation.

B. *The Facts*

1. Stickney's layoff and preceding events

Stickney testified that about 2 or 3 weeks before his December 3 layoff, Yard Supervisor Paul Brown had approached him near the monorail while Stickney was working the second shift—from 4 p.m. to midnight—and asked if Stickney had been involved in union activities at Artesian.[3] When Stickney replied that he was fired because of his union activities, Brown asked what it had been about. Stickney reiterated that he had been fired by Artesian because of his union activities, but that Artesian had claimed that he had used abusive language and had threatened to do bodily harm to a supervisor. Brown merely laughed.

Stickney averred that on about December 1, 2 days before his layoff, he went to Plant Manager Mike Rock, telling Rock that he had heard that he was going to be laid off. Rock replied that he knew that there was a snitch in the shop and that he was going to get him. Stickney repeated that he had heard that there was going to be a layoff. Rock confirmed that there would be one soon. When Stickney asked if he was going to be laid off, Rock answered that he was not sure. Stickney told Rock that he had been active in the Union at Artesian. Rock stated that he had heard of that and wanted to know about it. Stickney then repeated to Rock that, at Artesian, he had been accused of having used abusive language and of having threatened to do bodily harm to a supervisor. Stickney denied that there had been such conduct, pointing out that there were no witnesses to back the Company and that the Labor Board was supporting his case against Artesian.

Stickney also told Rock that, at Artesian, he had been in charge of safety violations, had been a union trustee, a steward, and had taken care of workers' compensation. Stickney informed Rock that, because of a rumor in the shop that he was involved in union activities, he had been approached by men within the Respondent's plant who had wanted him to start a union, but that he did not want to have anything to do with it. All he wanted was to put in his 8 or 10 hours, get a paycheck, and go home. Stickney did not want anything more to do with union activities; he had been off work for almost 3 years because of those activities; had lost his marriage, everything, and was fed up. Rock declared that he did not know about the layoff; he would see what he was going to do.

Paul Brown denied that he had known of legal proceedings between Stickney and any former employer and that he had asked if Stickney had participated in union activities.

Rock also testified that he never had spoken to Stickney about any lawsuits against the latter's former employers and denied that Stickney had told him that he had filed a proceeding before the Labor Board against Artesian. Rock further denied having had any conversation with Stickney concerning whether Stickney had had anything to do with a union and having told Stickney that there was a snitch in the shop whom the Company was going to get out. Stickney had told Rock only that he had heard a rumor that there was going to be a layoff.

Stickney learned of his layoff 2 days later from the secretary in the Respondent's main office who confirmed that he was being laid off that day. He again went to speak to Rock about his layoff. Rock told Stickney that if the men in the shop wanted him to work, the Respondent would keep him. When Stickney asked to whom he should talk, Rock suggested that he talk to machine operator Mike Noe. Stickney then went to see Noe, asking if he could use him on the monorail; Stickney could use the money. Noe declined, stating that he had enough help.

Stickney then approached Production Foreman Randall Brown, asking if he needed any help on the hacker, but Brown referred him back to Rock. Accordingly, Stickney's layoff became effective on December 3.

2. Stickney's efforts at recall

In late January 1994, having heard that everyone laid off with him had been recalled, Stickney called the Respondent's main office. As Rock and Vice President Scott Frame were unavailable, he spoke to Paul Brown, telling Brown that he had heard that the Respondent was hiring new help and that he would like to come back to work, hopefully on the next Monday. Brown replied that he did not know and would have to talk to Rock. Stickney reiterated that he had heard that the Company was hiring new help, to which Brown replied that the Respondent could not keep the employees it had and had to hire new help. When Stickney asked why he had not been called back, Brown said that he did not know but would talk to Mike Rock and have Rock get back to him. Rock, however, did not call.

On the following late January, Monday, at 8 a.m., Stickney went to the Respondent's office where he met with Scott Frame. Stickney told Frame that he would like to come back to work and asked if the Company was then hiring. Frame answered that he did not know and referred him to Rock in the shop. When Stickney entered the shop, he saw ''many'' new employees who had not worked while he was there. Rock suddenly appeared and told Stickney to get out of the shop. Stickney replied that he had Scott Frame's permission to be there. Rock asked what Stickney wanted. Stickney told him that he wanted to have his job back. Rock answered that they were not hiring. Stickney asked what Rock meant that he was not hiring; he had laid him off and had called everybody but him back to work. Stickney pointed out some of the new employees, and one in particular, who,

[3] Although Stickney testified that the conversation with Paul Brown had occurred only about 2 weeks before his layoff, the parties stipulated that the second shift, during which this incident supposedly had taken place, was discontinued after July and, accordingly, could not have happened after that month on that shift. Therefore, if the conversation occurred at all, it either was on the day shift or it took place about 4 months earlier than described. As the facts will indicate, a number of the Respondent's complaints about Stickney, presented as reasons for not recalling him, also transpired while he was on the second shift, months before the time of his layoff and the decision not to recall him.

Stickney said, was doing his job, work that Stickney could do. Rock declared that they were qualified in their jobs. Stickney retorted that he had done those jobs, too. Rock told Stickney that he was not calling him back and that he should leave the shop. Accordingly, Stickney left the Respondent's premises.

The parties stipulated at the hearing with respect to the December 3 layoff involving Stickney that the following 10 employees also then were furloughed: Richard Irwin, Timothy Shepherd, Allen Smith, Seth Williams (a/k/a William Williams), Michael Boyd, Randal Jarvis, Phyllis Montgomery, Michelle Hall, Sherie Ogle, and Laura Owens. All of the above returned to work on about January 7, 1994, with the exception of Shepherd, Williams, and Stickney, who have not worked for the Respondent since December 3. The record is not clear as to whether the Respondent had offered recall to Williams and Shepherd, but it does show that the Respondent, when summoning back its workers from layoff, also brought in a number of new employees who, inter alia, performed work previously done by Stickney. Accordingly, I find that after January 7, 1994, the Respondent replaced Stickney with new employees.[4]

3. Randal Jarvis' testimony and experiences

Randal L. Jarvis[5] testified that, on about January 7, 1994, while working near the monorail, approximately in the middle of the shop, he overheard a conversation between Rock and Paul Brown. Brown asked Rock why everyone had been called back but Stickney. Rock replied that Stickney had had too much trouble with the Labor Board and, through the Union, with Artesian, and that he was not going to call him back because of that. Although the plant generally was very noisy, Jarvis was doing work at the time, sorting glazes, that enabled him to hear well.

Jarvis related that about 2 days later, on January 9, he asked Rock, by a work station near the latter's office, if he was going to recall Stickney. Rock said no. When Jarvis asked why, Rock answered that Stickney had a case with the Labor Board against Artesian, that he had a workers' compensation claim against Artesian, and that he did not need that kind of trouble. Jarvis explained that he did not have a habit of asking management about other employees and had done so with respect to Stickney only because he was a friend.

Rock, in responding to Jarvis' testimony, could not recall having had any discussion with either Paul Brown or Randall Brown concerning Stickney's return to work other than discussing on the merits whether to recall him. He never had told Paul Brown that Stickney had too many cases before the Labor Board and that he did not need that kind of trouble. Rock also denied having spoken to Jarvis about Stickney and that Jarvis had inquired as to whether Stickney would return to work.

Jarvis averred that from the time of his December 1993 layoff until his March 1994 resignation, the Respondent hired about 50 new employees.

Jarvis connected the harassment by the Respondent which led to his departure to his friendship with Stickney. Jarvis related that, in early February 1994, Rock had asked why he still was running around with Stickney. Jarvis replied that he and Stickney were still friends.

Jarvis described a conversation in Rock's office with Production Foreman Randall Brown just as Jarvis arrived for work about a month before he left the Respondent's employ. Brown, a stipulated supervisor within the meaning of the Act, oversaw the front hacking belt, while his brother, Paul Brown, supervised the monorail. Paul Brown and employees Roy Duncan and Johnny Stevens also were present. When Jarvis came in, Randall Brown told him that he would be going to work on the hacking belt that morning. Jarvis asked why was he not going back into grinding since he had worked at that job for almost a month. Randall Brown replied that Rock had told him to put Jarvis ''out there'' to see if they could make him or break him. When Jarvis asked what that meant, Randall Brown told him that he and Rock had bet that they could make him quit. Accordingly, Jarvis worked on the hacking belt that day, was switched to the monorail on the following day and then, contrary to Company practice, was changed repeatedly to other jobs. Usually, employees did the same job every day unless there was a specific need to move an employee into a different department. Jarvis had begun work on the monorail, was moved to the hacking belt, and then was assigned to grinding. Rock had told him that he would be staying in grinding permanently, which was what Jarvis had wanted.

Jarvis described the hacking belt as a conveyor line from where the bricks, after being sprayed with glaze, were lifted from the conveyor belt, flipped, and stacked onto kiln cars on which the bricks were taken to the oven for refiring in order to bring out the glaze. The grinding room was where raw shell was ground into fine dust for use in making bricks. Jarvis considered the grinding job to be better than working the hacking belt because in grinding it only was necessary, protected by dust masks, to watch the equipment and keep

---

[4] To establish some connection between the Respondent and Artesian, the prior employer where Stickney's union activities took place, Stickney testified that, while at Artesian, he saw a Respondent's salesman, whom Stickney recalled only as ''Rex,'' talking there to an Artesian engineer who made glaze to be used on bricks. Rex was attempting to determine what might be done to make the glaze adhere better and to improve its color after application. Stickney explained that neither company supplied the other but that they assisted each other with respect to brick glaze. Subsequently, after Stickney went to work for the Respondent, he asked this salesman if he ever had been to Artesian. The salesman replied that he had gone there to check on the glaze.

Stickney explained his failure to list Artesian as a prior employer on his application for employment with the Respondent by stating that the Respondent's office secretary had told him that it would not be necessary to do so. Accordingly, the only earlier employer shown in the application was Shelby High School, where Stickney had worked after leaving Artesian.

Scott Frame, in turn, testified that, since the Respondent did not sell bricks to Artesian, there would have been no reason for its salesman to be there and that no one named Rex ever had worked for the Respondent.

[5] Jarvis, employed by the Respondent as a laborer from May 9, 1993, to March 21, 1994, was laid off on December 3 at the same time as was Stickney, but was recalled by January 7, 1994. A friend of Stickney who testified on his behalf, Jarvis' original statement that he had voluntarily resigned his job with the Respondent in March 1994 to go into his own business, to wit, a pizza business then purchased by his parents, was contradicted by his own subsequent evidence that he had been pressured to leave the Respondent's employ and that his departure had been acrimonious.

it clean so that it could run. The hacking belt, which required much lifting, was back-breaking work which could run from 8 to 14 hours a day.

Jarvis related that about a week after the above conversation with Randall Brown, while his job assignments were being continually changed, Rock came to him while he was working at the back end of the hacking belt, picking up 10 bricks at a time with tongs and putting them on the belt, and asked how much longer was it going to take before he quit. Employees Dennis Sowders, Rich Irwin, and Rich Carol, among others, assertedly present at the time, did not testify. Jarvis answered, ''Whenever hell froze over.'' During the week between the conversations with Randall Brown and Rock, Jarvis had been assigned to the tongs, to the front and rear parts of the hacking belt, to the heat transfer where green bricks were pulled out of the dryers and put on cars, to the monorail, to sorting glaze, to packing and to the yard. Thereafter, Rock occasionally would come to Jarvis' work area and exchange ''smart remarks'' with him.[6]

4. The Respondent's layoff and recall policies

Vice President Scott Frame, Plant Superintendent Mike Rock, and Monorail/Packaging Foreman Michael A. Noe[7] collectively testified that, while layoffs were common, they did not occur at any specific time of the year since the Respondent's business not only was seasonal, but also was dependent on the receipt of major customers' orders. Also, additional help was required during certain aspects of the production process so that more employees were needed when bricks were being sorted and/or glazed than when unglazed bricks were being produced.

Seniority played no role in the Respondent's determinations as to which employees should be recalled from layoff. Frame related that it was the Respondent's policy to recall the best employees from layoff as needed. Rock testified that he had the final decision as to who would be recalled, a determination that was based on the employee's job performance, work records, including those for lateness and absenteeism, and the supervisors' recommendations. A decision was made before recall as to how many workers were needed, the different duties that each could perform, and the number of machines they could operate.

Rock testified that he had made the decision to not recall Stickney because his job performance had been very poor. While he had been with the Company, Stickney had turned down different proffered assignments and, accordingly, could not run all the necessary machines or do many of the jobs that had to be done. Also, Rock had found it necessary to reassign Stickney from the setting machine to the monorail because Stickney had threatened that, if left on that job, he would hit his head and file a workers' compensation claim. Randall Brown also had reported to Rock that, if left on the tonging belt, a job that required much lifting, he would drop a brick on his toe and file a workers' compensation claim. Then rank-and-file employee Mike Noe had reported to Rock that while there was much work to be done on the monorail and elsewhere, Stickney had gathered other employees in groups about him where they talked instead of doing their jobs. Rock had discussed the prospect of Stickney's recall with Supervisors Randall Brown and Paul Brown, neither of whom wanted Stickney to work for them again.

Paul Brown and Randall Brown both confirmed that they had participated in the decision to not recall Stickney and had recommended against doing so. This was because Stickney, in addition to his poor work attitude in rejecting assignments, had torn up equipment and property, had provided the wrong bricks for a major color blending job, had damaged the overhead door to the plant by driving a forklift truck into it, had not returned to work from lunch on a given payday, had argued with them when his work was being corrected, and had engaged in other infractions all of which will be considered below.

Frame related, with respect to his job performance, that about three times during Stickney's employment, he had seen Stickney apparently drunk in the plant. Stickney's speech on those occasions had been slurred and loud and he had walked with a weaving gait. While Frame, contrary to his own work rules, had never spoken to Stickney about his apparent intoxication on the job or suggested testing to determine if he, in fact, was sober or under the influence, Frame confirmed Stickney's testimony that he had praised Stickney on about four occasions for being a good worker. This was so in spite of his negative view of Stickney, including that Stickney, more than any other employee, would try to talk to Frame when he walked through the plant. Stickney's testimony that the Respondent's president, Dudley Frame, in the autumn of 1993 also had praised him as a good worker was not rebutted.

5. Stickney's work performance

a. *Selection of the wrong bricks*

Paul Brown testified that when he arrived for work on a morning in the early summer of 1993, he learned that, during the preceding night, Stickney, at the time a tow motor operator on the then still operating second shift, had given the men the wrong bricks for a job where the Respondent was to package 100,000 bricks for a customer who needed eight different colors of blended bricks. When Brown told Stickney that he must have messed up and gotten the bricks from the wrong row, Stickney became angry, telling Brown that he was tired of people telling him that he was doing things wrong at the plant. He proceeded to ''cuss'' at Brown, repeating that he was tired of being told that he did things wrong and that he had not used the wrong bricks. After Stickney had finished his tirade, Brown told Stickney that if this ever happened again, he was going to fire him. Stickney pointed at Brown and told him to go ahead and fire him; he would sue Brown. Paul Brown denied having known that Stickney was pursuing legal proceedings against another employer.

Paul Brown thereafter reported to Rock that, although he had told Stickney the exact location of the bricks to be used for a special blend job, he had not used those bricks and that, therefore, the color was different and the job was ruined. As a result, it was necessary to break the job down and to change the bricks. Paul Brown told Rock that Stickney had

[6] Since no unfair labor practice charges were filed concerning Jarvis' employment with the Respondent, no findings are made with respect thereto.

[7] Although Noe was a supervisor within the meaning of the Act by the time of the hearing, he still was a production employee when Stickney was with the Respondent.

been verbally reprimanded. There was no written record made of this infraction or of the verbal reprimand.

Stickney explained that when he delivered the wrong bricks, he had been a tow motor operator for only 2 weeks and had not had much experience in picking up different kinds of bricks because they all looked the same. He had gathered the bricks that his then supervisor, Jimmy Smith,[8] had told him to get. When Paul Brown told Stickney on the next day that he had gotten the wrong bricks and asked where he had obtained it, Stickney had replied, ''Right down where Jimmy Smith had told him to get it.'' Stickney told Paul Brown that if he had any trouble with the way in which he had had put the bricks together, he should talk to his supervisor, Smith.

b. *Damage to the overhead door and to other Respondent's property*

During the late spring or early summer of 1993, Stickney admittedly ran a forklift into an overhead door. He reported this incident within 15 minutes to Maintenance Supervisor Steve Rock, Mike Rock's brother. Stickney related that Steve Rock had told him not to worry about this; that no damage had been done. All that it would be necessary to do would be to take the bolts off and put the door back on track. Stickney denied that he ever had run into bricks or other materials in the plant while operating Respondent's vehicle.

Paul Brown, however, testified that because of Stickney, the Respondent had had a lot of trouble with packages of bricks being torn up in the yard and with the wrong bricks being sent to dealers. Almost every morning when Brown came to work, he learned that something had been torn up on the second shift because of the forklift operator, Stickney being the only one. Stickney's repeated response to Brown was that it was going to take him time to learn the forklift job. Paul Brown, who earlier had driven the forklift for some years, knew that the forklift operation was hard, particularly when the machine was used to pick up cubes of bricks.[9] He had continued to forebear, thinking that things would improve.

Mike Rock testified that, in late May or early June, Paul Brown reported to him that Stickney had damaged the plant garage door, showing it to Rock. Rock did not say anything to Stickney on that occasion but asked maintenance to try to repair the door. They were unsuccessful, the door remained damaged at the time of the hearing and, according to Frame, its estimated replacement cost would be about $1000. Rock related that he took no personal action but that Paul Brown had given Stickney a verbal warning for that incident. The record however reveals that Stickney never was written up or disciplined for damaging the door or for having torn up or otherwise harming the Respondent's property.

c. *Use of alcohol during work hours and miscellaneous infractions*

Scott Frame averred that, on about three occasions during the second shift, he saw Stickney apparently drunk in the plant. Stickney's speech was slurred and loud and he walked with a weaving gait. Frame however never spoke to him about this. Frame related that the discontinued second shift essentially had been unsupervised. Although, as will be discussed, such conduct was grounds for immediate discharge under the Respondent's work rules, Stickney did not test or otherwise was confronted when supposedly under the influence of alcohol at the plant. Frame explained that, while he had expected that Stickney would be dealt with by lower-level supervision for having been drunk while on the job, no disciplinary action was ever taken against Stickney related to alcohol use or for other reasons. When, months later, in December, Stickney was laid off, Frame testified that the layoff solely was for lack of work and not for any of the infractions attributed to Stickney.

d. *The failure to return to work—the Airport Lounge incident*

Paul Brown testified that, on October 29, Stickney and employees Dennis Sowders and Joe Taylor[10] did not return to work from lunch. Stickney and Sowders, the next morning, claimed that they had been kidnapped by Taylor.[11]

Stickney confirmed that, on October 29, he was ''kidnapped'' by fellow employees who had driven him to the Airport Lounge about 4 miles from the Respondent's plant, where employees often went on paydays to have lunch and to cash their checks. Stickney testified that the employees who drove him to the Airport Lounge that day, Dennis Sowders and Joe Taylor, would not drive him back to the plant and would not let him call to explain his situation. As a result, Stickney was compelled to stay at the lounge for 2 hours and missed the afternoon at work. He did not have any drinks at the Airport Lounge until later, when it had become clear that he would not be able to return to work, at which time he had a ''draft.'' Stickney finally got home when Taylor drove him back to his car at the Respondent's premises at around 5:30 p.m. It had taken some time at the airport Lounge to have lunch and to cash the checks. Stickney had not been physically restrained from leaving, but did not have his own transportation. Had he known that Sowders and Taylor were going to keep him at the lounge, he would have left with other employees who had returned to the plant.

e. *Reluctance to accept assignments; threats to injure himself and to file false workers' compensation claims*

Production Foreman Randall Brown testified that Stickney had worked intermittently for him as a hacker and tonger, particularly during a 2-month period in 1993 when the plant was glazing bricks.[12] Tongers used tongs to pick up cubed

[8] Supervisor Smith no longer was with the Respondent at the time of the hearing.

[9] A cube is a package of 325 bricks.

[10] Taylor, employed by the Respondent from May to December 1993, had worked in production under Paul Brown's supervision.

[11] Although Brown testified that all three employees had received written warnings from him because of the incident, the Respondent's offer of the written warning purportedly given to Stickney was rejected because it neither was dated nor ever shown to Stickney. Since Stickney had not previously known of that document, it could not have served as a prior warning to him and, from the foundation laid for its receipt into the record, in the context of the Respondent's other deviations here from its supposedly established work rules, it could not be determined whether the ''warning'' had been prepared on about October 29 or en route to the hearing.

[12] When the glazing process was not in progress, Stickney would return to work at the other end of the plant.

bricks and place them on a belt that moved down the line. Stickney had preferred to work as a hacker who, as noted, lifted somewhat lighter loads of bricks from conveyor belts onto kiln cars, but Randall Brown would trade hackers to fill in for tongers who had sore muscles. On one occasion, Stickney told Randall Brown that he could drop a brick on his toe and go home if he had to do tonging. Rock confirmed that Randall Brown had reported to him during the summer of 1993 that Stickney had threatened to drop a brick on his toe and, thereby, have another workers' compensation case against the Respondent. Rock did not take disciplinary action against Stickney but left the course of action up to Brown. He did not recall if Brown had reported any disciplinary action against Stickney for that incident.

Randall Brown conceded that although he was responsible for taking corrective action if Stickney, or any other employee, failed to conform to company rules, Stickney never was written up for not wanting to work on the tong line or for having threatened to harm himself to escape that assignment. Stickney was not the only employee who ever had expressed a preference for working in a certain location. While most of the employees complained, they did their jobs. Stickney was the only employee who ever had threatened to drop a brick on his toe. Brown related that each of his four tongers and the man who flipped the bricks had asked him to remove Stickney because they were doing his work for him. Randall Brown however could not remember which employees had said this to him because the employee turnover was so great.

Nonetheless, Randall Brown never warned Stickney verbally or in writing. He related that Stickney had come to work every day, had had no absenteeism problem, and had produced good work product.

As plant superintendent, Rock had not directly supervised Stickney but, from his periodic rounds of the plant and conversations with employees and their supervisors, he contradicted Randall Brown by characterizing Stickney's work as poor.

In the summer of 1993, Rock had asked Stickney to work on the setting machine, which set bricks that had been unloaded from the racks onto cars. After Stickney had spent a half hour on that job, he told Rock that if he did not take him off the setting machine, Stickney was going to hit his head, and file a workers' compensation case. Accordingly, Rock reassigned Stickney to the monorail. Rock explained that other employees had been assigned to the setting machine, that the work was not particularly onerous, and that Stickney had not been assigned there for disciplinary reasons. Two men usually worked the machine at the same time and it might be necessary to pick up a damaged fallen brick, throw it into a hopper 3 to 5 feet away, and replace it with bricks kept in stock for that purpose. No disciplinary action was taken as a result of Stickney's threat to file a bogus workers' compensation claim.

Stickney denied that he ever had told anyone that he would drop a brick on his toe and, as a safety measure because of his work environment, he always wore steel-toed safety shoes on the job—while with the Respondent and at his subsequent place of employment.

Stickney also disputed testimony that he had told Rock that he would hit his head. According to Stickney, while he was working on the setting machine, he had reached down to pick up a fallen brick. As he was doing this, two bricks from among those stored overhead on the machine's cushions or pads fell hitting Stickney on the top of his head knocking him out for a second or two. Mike Noe, the setting machine operator at the time, and Freddy Brown, then an employee, assertedly had witnessed this accident but did not testify. Stickney explained that the setting machine, which measured about 8 feet wide by about 6 feet, had a swinging arm that descended to pick up bricks from a conveyor belt. The machine repeated this process until it had gathered and stored overhead about 500 bricks. The arm then swung out over the top of a kiln car, placing the bricks into the car in successive layers. During this process, the setting machine operator was required to pick up any fallen bricks and put it back in place so that the layering would come out even. Stickney was retrieving fallen bricks when he was hit. Stickney stated that he always had checked to make sure that other bricks were not going to fall, but that the pads supporting the bricks were in bad condition having been wrapped in duct tape. The two bricks that had struck him were of heavy clay, measuring about 10 by 4 inches. Afterwards, Stickney asked if Rock would take him off of the setting machine because both his head and neck hurt. Stickney did not miss work because of this accident and did not go to a physician. He simply had wanted to go to another job because of the resultant soreness. Rock had told Stickney, ''No problem; go to the monorail.''[13]

f. *Talking with groups of employees during work hours*

Paul Brown testified without contradiction that when Stickney worked at Brown's end of the production line, in packaging, Stickney would gather together four of his friends and that it had been necessary to separate these employees from Stickney to get any work from them.

Rock, too, testified, that at an unremembered time, Mike Noe, who then operated the monorail as a nonsupervisory employee, went to Rock's office with a complaint that Stickney and a couple of friends always were talking in small groups, and that, although Noe had a lot of work to do, every time he went by, those others were talking and not doing their assigned jobs. No one was disciplined as a result of Noe's report.

Noe did not recall having spoken to Rock about Stickney.

g. *Threat to get even*

Noe testified without contradiction that about 2 weeks after the December 3 layoff, he, Bobby Tackett, and around two other Respondent's employees encountered Stickney at a small store near the Respondent's premises where the employees went to buy sandwiches. Stickney told the others that he was deer hunting and the men spoke of deer hunting for awhile. When asked how he was doing, Stickney replied that

[13] Stickney did recall one conversation with a foreman, not referenced by the Respondent, on the matter of his readiness to accept assignments. The foreman had asked him one day at about 5 p.m. to help out in the kiln department on the next shift to replace an employee who had gone home. Stickney replied that he would try his best to help out until 7 p.m., but that his neck was bothering him. Stickney informed Rock that he had then gone to the hospital where swelling in his neck had been found causing him to take off work for 3 days.

it didn't matter that ''they'' had laid him off, he was getting his unemployment and would get even with ''them.''

6. The Respondent's work rules and their application

Vice President Frame produced for the record a document prepared by himself, entitled ''Plant Rules, Policies and Procedures,'' as revised in July 1993, which, as indicated on the last page, was in effect since at least January 4, 1991, and, supposedly, was given to all new employees. The final page of the document contained a block where the employees were to sign and date acknowledgment that they had read, or had had the rules read to them, that they understood the rules and that they had received them.[14]

The revised rules, inter alia, recognized six paid holidays a year and established progressive discipline for lateness/-absenteeism and a series of general rules; eliminated paid vacations until the Company was again operating profitably; and, under ''Disciplinary Procedures,'' listed violations in categories 1, 2, and 3, respectively. Category 1 infractions, punishable by immediate discharge, included, among others, the deliberate falsification of personnel or other records, which include misrepresentation of an individual's ability, experience, and qualifications when applying for a job, and being under the influence of any alcoholic beverage or illegal drugs while on Respondent's premises.

Category 2, for which violation of any listed item was to result in immediate layoff of varying duration, or dismissal in severe or repeat cases, included unauthorized or negligent operation of machinery or equipment; refusal to do the job assigned by supervision; restricting output or attempting to restrict the amount of work performed by others; and careless workmanship.

Category 3 violations, any of which was to result in disciplinary action which might encompass layoffs or dismissal, included an employee's leaving the plant or own department during working hours, except on company business and with management's approval, and wasting time or loitering during work hours.

Specifically, although Frame, as described, testified that he had seen Stickney apparently drunk in the plant on three occasions, three category 1 offenses each of which warranted immediate discharge, Stickney was not reproved or disciplined in any way for such conduct. Stickney's failure to list Artesian as a prior employer in his job application to the Respondent also could have been a category 1 offense. His time at Artesian, of course, was significant since that connection and the alleged emanating events form the basis for this case.

Frame conceded that the damage Stickney caused to the overhead door by his operation of the forklift, and the correspondent scarring of the forklift, constituted another unpenalized category 1 violation, if deemed deliberate or, from the language of the rules, a category 2 offense if construed as negligent.

Rock agreed that Stickney's refusals to accept certain assignments were category 2 offenses even without his two asserted accompanying threats to harm himself and file false workers' compensation claims against the Respondent if not removed from the tonging line or from the setting machine. Rock further admitted that Stickney's practice of monopolizing the worktime of others by gathering and talking with groups of employees during worktimes restricted those employees' work output and were category 2 violations, as was his careless workmanship in putting the wrong bricks into the circuit for the large eight color blending project previously described and his negligent use of the tow motor and forklift to tear up company property.

Stickney's category 3 failure to return to work from the airport lounge after lunch on October 29, under the Respondent's policy of progressive discipline for unexcused absences, at minimum, should have put him in line for a written warning.

It however is clear that, in spite of the above supposedly published rules, Stickney was not disciplined for any of the above infractions regardless of category, however repeated, and no personnel file entry was offered to show that he had received even a verbal warning. The only written warning assertedly prepared, for Stickney's failure to return to work from the Airport Lounge, never was shown to him. Rock agreed that for months, until Stickney was laid off, the Respondent was prepared to and did tolerate his behavior. Rock explained that the rules did not become enforced at the plant until recently and that, in 1993, they had been very loosely administered, not just with respect to Stickney, but as to all employees. While verbal reprimands should have been recorded, that practice was not always followed.

7. The rejected workers' compensation claim

By decision, dated May 25, 1994, months after it was apparent that Stickney was not going to be recalled by the Respondent from his December 3, 1993 layoff, the Ohio Bureau of Workers' Compensation denied his benefits claim against the Respondent for sprains to his right ankle and foot alleged to have occurred on May 7, 1992, when Stickney assertedly stepped off a tow motor into a hole. Noting that the emergency room report stated that the alleged injuries had occurred on the day before that claimed, on May 6, 1992, while Stickney was getting out of his pickup truck, and that his employment with the Respondent did not start until May 7, 1993, a full year after the alleged date of injury, the bureau's administrator found that the alleged injuries were not due to Stickney's employment.

C. *Discussion and Conclusions*

The evidence presented by the parties on each side of this proceeding is flawed. Although the Respondent's witnesses generally protested that Stickney was a poor worker who, on three occasions, apparently had been drunk in the plant; who had damaged an overhead door and other company property by his incompetent operation of a forklift truck; who, by putting the wrong bricks in the circuit, had ruined a large order for color-blended product; who had been reluctant to accept certain assignments to the point of twice threatening to injure himself and file false workers' compensation claims in order to be removed from designated jobs; who more than once had restricted his own work output and that of other employees by gathering them into discussion groups during work hours; and who, without company permission or valid excuse, had failed to return to work from an off-premises

[14] Jarvis testified that he did not receive his copy of the rules until his last 2 weeks with the Respondent, while Stickney denied ever seeing or receiving them.

lunch, he admittedly was laid off with 10 other employees for economic reasons only well after the occurrence of most of the aforesaid asserted infractions. In spite of the fact that the Respondent's published plant rules, ''Policies and Procedures'' provided that virtually any of the aforesaid violations, taken alone, were grounds for immediate dismissal or layoff, Stickney never was demonstrably disciplined in any way but, rather, the undisputed evidence is that, during his employment, he was praised four times for being a good worker by the Respondent's vice president, Scott Frame, and once by President Dudley Frame. Even when assertedly he had yelled at Supervisor Paul Brown for having spoken to him about the ruined large order for blended bricks, there is no record of even a verbal warning either for having scrapped the order or for insubordination. As described by the Respondent's witnesses, in the administration of the Company's personnel policies, there was just about nothing the Respondent was not prepared to tolerate long term. His work record and attitude became factors only in the subsequent decision to not recall him, not in his layoff. In a real sense, the Respondent here is asking the Board to take Stickney's infractions in its work place more seriously than it was prepared to do when they occurred. In other, less pronounced circumstances, this would raise possibly controlling questions as to whether Stickney had been responsible for everything attributed.

Nonetheless, however questionably the Respondent has administered its personnel policies and discipline in its plant, Stickney's credibility is tainted in the first instance by the workers' compensation claim, rejected May 25, 1994, he had filed against this Respondent for injuries which, the relevant bureau found, were sustained fully a year before the start of his employment with the Respondent. The bureau's decision also noted that Stickney's supporting emergency room report showed that, when he first had sought medical assistance, Stickney reported that the injuries had occurred 1 day earlier than cited in the claim and had happened while descending from his pickup truck, rather than when stepping from an employer's tow motor into a hole. The apparently dual misrepresentations made to support this claim—as to the identity of his employer when he was hurt and as to how and where the injuries occurred—not only detract from the veracity of Stickney's account of his conversations with Respondent's supervisors, Rock and Paul Brown, concerning his prior involvement with the Union at Artesian, which was denied by them, but add credence to the testimony of Rock and Randall Brown that, to be relieved of undesirable assignments he, respectively, had threatened to hit his head, to drop a brick on his toe, and to file workers' compensation claims against the Respondent for both injuries. Such false claims would be consistent with what Stickney already has done.

The record further indicates that the occurrence of a number of Stickney's workplace infractions were undisputed. Accordingly, Stickney admitted that he had damaged the overhead door, blaming it on inexperience with the forklift; that he had given the employees the wrong bricks in the major order for blended bricks, blaming that on a former supervisor; and that he had not returned to work after lunch at the airport lounge, explaining that he had been kidnapped and held there incommunicado. In the last instance, Stickney's excuse for not having gone back to work from the airport lounge speaks for itself. As no evidence was offered that, while held at the lounge, Stickney had attempted to get assistance, that he had tried to make a break for work and freedom by taking a bus or taxi the 4 miles back to the plant or that he, thereafter, had filed a complaint concerning his abduction with the police, it cannot be found that he did any of those things. Without joining in the Respondent's speculation that Stickney's real reason for not going back to work from the lounge was because he was too intoxicated, considering Stickney's testimony that he did not take his first beer draft until the afternoon when it became clear that he was not going to be driven back to work, I note that he apparently was not held hostage or, if so, that he was well treated. More seriously, Stickney's conduct in this regard and his accompanying justification reflect on his attitude and calibre as an employee.

The Respondent, by not following its policies in failing to timely and effectively deal with Stickney's infractions, may have violated its own rules, but Stickney, in filing his above patently false workers' compensation claim against the Respondent, violated those of society. For that and for other reasons noted here, including his acknowledged breaches of work rules and actions reflecting on his work competence and attitude, I do not credit Stickney where his testimony conflicts with that of other witnesses to this proceeding. Therefore, Stickney's denied accounts of his prelayoff conversations with Paul Brown and Rock about his union activities while at Artesian are not accepted.

I also do not rely on the testimony of Jarvis, Stickney's supporting witness. Jarvis initially testified that he voluntarily had resigned his job with the Respondent to go into business, thereby implying that his departure and his testimony on Stickney's behalf would be dispassionate. It however appeared from his later testimony that Jarvis had quit under Company-applied pressure, with further implication that the Respondent had applied such duress because of his known friendship with Stickney. Accordingly, Jarvis testified that Rock had asked him in February 1994 why he still was running around with Stickney. Such circumstances could materially have colored and made less disinterested Jarvis' testimony concerning the Respondent and Stickney. On the other hand, although Jarvis had been laid off in early December 1993, at the same time as Stickney and nine other employees, his friendship with Stickney did not prevent his recall in early January 1994. What is internally inconsistent about Jarvis' testimony apart from his conflicting accounts as to why he left the Respondent's employ and questions of patness was the unlikelihood that, assertedly having actively undertaken to force Jarvis' resignation, at least in part, because of his relationship with Stickney, Rock, when asked by Jarvis why Stickney had not been recalled, would not just confide in Jarvis, but would do so stating reasons deleterious to the Respondent. Similarly, it seems unlikely that Rock would make similar representations to Paul Brown where Jarvis was situated to have heard them. In an admittedly noisy plant, Jarvis would have had to have been conspicuously close to have overheard such a conversation. Accordingly, I find that the Respondent did not violate Section 8(a)(1) of the Act in that Rock did not state, either directly to Jarvis or in conversation with Paul Brown overheard by Jarvis, that Stickney would not be recalled from layoff because he had a case pending against Artesian before the Board and that he, or the Respondent, did not need that kind of trouble.

Having found implausible the testimony of Stickney and Jarvis concerning conversations with Respondent's officials, participated in and/or overheard, concerning Stickney's union activities at, and lawsuits against, a prior employer, I find no evidence of a connection between the Respondent and Artesian sufficient to provide notice to the Respondent that Stickney had been active on behalf of a union while with Artesian or that he had filed any legal actions against that Employer. Even if Stickney had seen a Respondent's salesman at Artesian while he had worked there, Stickney testified that he did not speak to the salesman until later when he already was with the Respondent and, then, only of other things, such as what the salesman had been doing at Artesian. As noted, Stickney had not even listed Artesian as a prior employer in the job application he filed with the Respondent and had not engaged in union activities while with the Respondent. There is no showing as to why the Respondent, either through its salesman or by some institutional relationship with Artesian, would have had any knowledge of Stickney's union activities at Artesian.

The record, in any event, establishes, contrary to the allegations of the complaint, that Stickney was laid off in December together with 10 other employees, 8 of whom were recalled to work in approximately 1 month. I find from this pattern of recall and from the uncontroverted testimony that layoffs were common in the Respondent's business, that Stickney originally was lawfully laid off with a group of employees, most of whom were acceptable to the Respondent, for economic reasons and that, unlike 8 of the 11 laid off, he was not recalled because of his work performance and attitude. While it is established that it is unlawful to discriminate against an employee because of union activities at some prior place of employment and/or because the employee had filed and prosecuted unfair labor practice proceedings against that earlier employer,[15] I find from the credited evidence that the Respondent did not violate Section 8(a)(1), (3), and (4) of the Act by laying off and/or refusing to recall Stickney because of his prior union activities and sympathies while he was with Artesian and/or because he had initiated and prosecuted unfair labor practice proceedings against that Employer. Even if the General Counsel had established by credible evidence the violation of Section 8(a)(1) of the Act alleged in the complaint so as to help establish a prima facie case, under *Wright Line*,[16] the Respondent has shown by a preponderance of the evidence that, in any event, it would have laid Stickney off when it did for economic purposes and that it did not recall him for the lawful reasons established in the record.

[15] *P*I*E Nationwide, Inc*., 282 NLRB 1060, 1065 (1987), supplemental decision 297 NLRB 454 (1989), enfd. 894 F.2d 887(1990).

CONCLUSIONS OF LAW

1. The Respondent, Richland Moulded Brick Company, is, and at all times material here has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent did not engage in conduct violative of Section 8(a)(1), (3), and (4) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

It is ordered that the complaint is dismissed in its entirety.

[16] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *Transportation Management Corp*., 462 U.S. 393 (1983).

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.